FILED
SEP 2 1998
OFFICE OF THE CLERK

No. 97-2029

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PARAMOUNT HEALTH SYSTEMS, INC., personally and on behalf of the plaintiff class, and METROPOLITAN AMBULANCE ASSOCIATION,

Petitioners,

v.

JOAN WALTERS, as Director of the Illinois Department of Public Aid, and DONNA E. SHALALA, as Secretary of the United States Department of Health and Human Services,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT JOAN WALTERS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES E. RYAN
Attorney General of Illinois

BARBARA PREINER
Solicitor General of Illinois

JAMES C. O'CONNELL*
MARK LICHTENFELD
Assistant Attorneys General
160 North LaSalle Street
Suite N-1000
Chicago, Illinois 60601
(312) 793-2380

Attorneys for Respondent Joan Walters

* Counsel of Record

Printed by Authority of the State of Illinois (P.O. 37075—80—9-2-98

16pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

I. NATURE OF THE CASE 1

II. COURSE OF PROCEEDINGS IN THE DISTRICT COURT 2

III. COURSE OF PROCEEDINGS IN THE APPELLATE COURT 3

SUMMARY OF ARGUMENT 4

REASONS FOR DENYING CERTIORARI 5

I.

THE BALANCED BUDGET ACT'S CLARIFICATION MADE CLEAR THAT CONGRESS NEVER INTENDED TO REQUIRE THE STATES TO PAY MEDICARE COST-SHARING CHARGES ABOVE THE STATES' MEDICAID RATES 5

II.

THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL THAT HAVE CONSTRUED THE COST-SHARING STATUTES SUBSEQUENT TO THE CONGRESSIONAL CLARIFICATION 7

III.

THE STATE DEFENDANT DID NOT RETROACTIVELY ELIMINATE PLAINTIFFS' PROTECTED PROPERTY RIGHTS 9

CONCLUSION 11

TABLE OF AUTHORITIES

Cases PAGE(S)

Beverly Community Hospital Association v. Belshe, 132 F.3d 1259 (9th Cir. 1997) 8

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 4

Haynes Ambulance Services, Inc. v. Alabama, 36 F.3d 1074 (11th Cir. 1994) 9

New York City Health and Hospitals Corp. v. Perales, 954 F.2d 972 (2nd Cir. 1992) 9

Paramount Health Systems, Inc. v. Wright, 138 F.3d 706 (7th Cir. 1998) 4, 8

Pennsylvania Medical Society v. Snider, 29 F.3d 886 (3rd Cir. 1994) 9

Rehabilitation Association of Virginia, Inc. v. Kozlowski, 42 F.3d 1444 (4th Cir. 1994) 9

Statutes

42 U.S.C. §1304 10

42 U.S.C. §1395 2

42 U.S.C. §1396a(a)(10)(E) 1, 5

42 U.S.C. §1396a(n) 5, 6, 7

42 U.S.C. §1396a(a)(13)(A) 10

42 U.S.C. §1983 3

Balanced Budget Act of 1997 §4714,
Pub. L. 105-33, 111 Stat. 251 ..... *passim*

Other Authorities

H. Conf. Rep. No. 105-217, 143 Cong. Rec.
H6252 (daily ed. July 29, 1997) 7, 8

H.R. Rep. No. 105(II), 100th Cong., 2nd Sess. 6

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This case concerns the Medicaid program, a federal-state cooperative plan which provides medical coverage to qualifying poor persons. Illinois, in accordance with the Secretary of the United States Department of Health and Human Service's interpretation of the Medicaid program, has instituted certain regulations which are contained in Illinois' state Medicaid plan. As with all cooperative programs, states retain latitude to run their Medicaid programs within the confines of the Secretary's approval of the state plan.

Certain Medicaid beneficiaries are known as "qualified Medicare beneficiaries" or "QMBs." These beneficiaries are eligible to have Medicaid pay for Medicare Part B insurance premiums and deductibles (collectively referred to as "cost-sharing") within the proscribed limits. 42 U.S.C. §1396a(a)(10)(E). Under the Illinois Medicaid-financed cost-sharing regulations for QMBs, entities providing goods or services to QMBs are reimbursed up to the state Medicaid rate for the respective goods or services. The plaintiffs challenge these regulations and allege that the state must pay the full Medicare rate for cost-sharing. However, the Secretary's statutory interpretation of the QMB language of the Medicaid Act allows the states to limit their cost-sharing payment to the amount by which the Medicaid rate exceeds the Medicare charge. Illinois administers its Medicaid program in accord with the Secretary's construction.

In 1995, petitioners brought suit against Robert Wright, former Director of the Illinois Department of

Public Aid, and Donna Shalala, Secretary of Health and Human Services, challenging the legality of the provider reimbursement provisions of Illinois' medical assistance program. 42 U.S.C. §1396 *et seq.* (the Medicaid Act). (Robert Wright has since been succeeded by Joan Walters as the Director of the Illinois Department of Public Aid). Petitioners alleged that the Illinois medical assistance program, approved by the Secretary and administered by respondent Wright, violates Title XVIII of the Social Security Act, 42 U.S.C. §1395 *et seq.* (the Medicare Act) and the Medicaid Act.

II. COURSE OF PROCEEDINGS IN THE DISTRICT COURT

In March, 1995, Paramount Health Systems, Inc. ("Paramount") instituted a proposed class action lawsuit against Robert Wright, in his official capacity as Director of the Illinois Department of Public Aid ("IDPA") and Donna Shalala, in her official capacity as Secretary of the United States Department of Health and Human Services ("HHS"). Paramount sought a declaration that the Director's implementation of an IDPA regulation, with the knowledge and consent of the Secretary, violates provisions of the Medicare and Medicaid Acts. Paramount also requested an injunction against the Director from continuing this practice. The Director and the Secretary moved to dismiss Paramount's complaint alleging that Paramount lacked standing to bring the action and that the provisions of the Medicare and Medicaid Acts, which Paramount alleged were being violated by the Director, did not create enforceable rights in favor of Paramount within

the meaning of 42 U.S.C. §1983. The district court denied defendants' motions to dismiss.

In April, 1995, Paramount filed a motion for summary judgment and a motion for class certification. Also in April, 1996, the Metropolitan Ambulance Association ("MAA"), on behalf of and along with its members, filed a motion for leave to intervene in this case. The Secretary filed a cross-motion for summary judgment in May, 1996.

The district court granted MAA's motion for leave to intervene on July 22, 1996. On July 25, 1996, the district court granted Paramount's motion for summary judgment and denied the Secretary's cross-motion for summary judgment. The district court entered its final judgment for declaratory and injunctive relief in favor of plaintiffs on August 2, 1996, and certified a class compromised of "all entities and persons who have furnished items or services or will furnish items or services covered by Medicare part B since March 1, 1993, to Illinois QMBs." The court stayed enforcement of its judgment pending appeal.

III. COURSE OF PROCEEDINGS IN THE APPELLATE COURT

On September 30, 1996, respondents filed their notice of appeal with the district court. The court of appeals heard oral argument on April 17, 1998. Prior to a decision by the court of appeals, the Balanced Budget Act of 1997 was enacted by Congress. The court of appeals scheduled supplemental briefing on the subsequent Congressional legislation and the case was reargued on January 15, 1998. The court of appeals de-

cided the case on March 19, 1998, reversing the district court's judgment.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari seeks review and reversal of the Seventh Circuit's decision in *Paramount Health Systems, Inc. v. Wright*, 138 F.3d 706 (7th Cir. 1998). The Seventh Circuit's decision was based on the Congressional clarification of the Medicaid-financed cost-sharing statutes as set forth in the Balanced Budget Act of 1997. Pub. L. 105-33, 111 Stat. 251. In *Paramount*, the Seventh Circuit ruled that the Balanced Budget Act provided additional evidence of the meaning of the Medicaid Act's cost-sharing provisions. Accordingly, the ambiguity created by the language of the original cost-sharing statutes, coupled with the Congressional clarification, thereby necessitated *Chevron* deference to determine the meaning of the statutory scheme. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Deferring to the Secretary's interpretation requires a finding in accord with Illinois' construction of the cost-sharing statutes. Accordingly, the *Paramount* court upheld the State of Illinois' Medicaid-financed provider reimbursement regulations as they apply to QMBs.

The decision of the court of appeals is in accord with this Court's holdings that subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. Congress correctly enacted the §4714 of the Balanced Budget Act to clarify a statutory scheme which many courts had found to be puzzling. The decision of the court of appeals was

also in accord with a similar ruling by the Ninth Circuit court of appeals and there are no conflicting decisions which have been rendered since the enactment of the Balance Budget Act. As the court of appeal's decision was in accord with §4714 of the Balanced Budget Act and is not in conflict with the decisions of any other circuit, this Court should deny the petition for writ of certiorari.

Because Petitioners attack both the constitutionality of portions of the Balanced Budget Act and the Secretary's construction of the Medicaid-financed cost-sharing statutes, the state defendant expects that the federal defendant will continue to adequately defend the constitutionality and interpretation of the Balanced Budget Act's Congressional clarification. In order to eliminate redundancy, the state defendant will therefore adopt the Secretary's response to the Petition for Writ of Certiorari. The state defendant also files this limited response in order to highlight specific issues for the court's consideration.

REASONS FOR DENYING CERTIORARI

I.

THE BALANCED BUDGET ACT'S CLARIFICATION MADE CLEAR THAT CONGRESS NEVER INTENDED TO REQUIRE THE STATES TO PAY COST-SHARING CHARGES ABOVE THE STATES' MEDICAID RATES

The cost-sharing provisions of the Medicaid statute are found at 42 U.S.C. §1396a(a)(10)(E). Subsection (n) of the cost-sharing statute, 42 U.S.C. §1396a(n), addresses "payment amounts" for "Medicare cost-sharing" with respect to QMBs. This section gives states the

option to pay cost-sharing rates above the normal Medicaid reimbursement caps. Specifically, this section provides that "[t]he State plan may provide payment in an amount . . . exceeding the amount that is otherwise payable under the State plan for the item or service for eligible individuals who are not qualified Medicare beneficiaries." 42 U.S.C. §1396a(n).

Illinois' administration of the Medicaid-finance cost-sharing program does not require Medicare cost-sharing for QMBs above the state Medicaid rate. This state provision is in harmony with the Secretary's long-standing construction of the cost-sharing statutes. The Illinois regulation was further supported by Congressional pronouncement in the Medicaid Act's legislative history. In its clearest and most comprehensive statement at the time, Congress declared:

> Under the Committee bill, States would not be required to pay the Medicare coinsurance in the case of a bill where the amount reimbursed by Medicare—i.e., 80 percent of the reasonable charge—exceeds the amount Medicaid would pay for the same item or service.

H.R. Rep. No. 105(II), 100th Cong., 2d Sess., *reprinted* in 1988 U.S.C.C.A.N. 857, 884.

The legislative history supported both the Secretary's construction and Illinois' interpretation of the cost-sharing statutes. Yet, in order to clarify the legislative intent and to resolve any lingering confusion about the program, Congress clarified §1396a(n) as part of the Balanced Budget Act of 1997. (Pub. L. 105-33, 111 Stat. 251). Specifically, §4714 of the Balanced Budget Act is entitled a "Clarification regarding state liability for

Medicare cost-sharing." This section amended §1396a(n) of the Medicaid cost-sharing statute to make clear that states were not required to provide payment for any Medicare cost-sharing "to the extent that payment under title XVIII for the service would exceed the payment amount that otherwise would be made under the State plan under this title for such service if provided to an eligible recipient other than a Medicare beneficiary."

Included with this clarification was a comprehensive report describing Congress' understanding of the law as it existed prior to the Balanced Budget Act. The report recognized the existing controversy regarding Medicaid payments for Medicare cost-sharing. The report provided an explanation of the cost-sharing statutes' clarification. The elucidation reiterated that "[S]tate Medicaid programs may limit Medicare cost-sharing to amounts that, with the Medicare payment, do not exceed what the State Medicaid program would have paid for such service . . ." H. Conf. Rep. No. 1054-217, 143 Cong. Rec. H6252. The Balanced Budget Act of 1997 effectively sustained both the Secretary's long-standing construction of the cost-sharing statutes and Illinois' administration of the program as correct interpretations of the law as it existed before 1997.

II.

THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL WHICH HAVE CONSTRUED THE COST-SHARING STATUTES SUBSEQUENT TO THE CONGRESSIONAL CLARIFICATION

Prior to the enactment of the Balanced Budget Act of 1997, there was substantial confusion concerning the

meaning of the cost-sharing statutes at issue in the *Paramount* case. This ambiguity constituted good cause for *Chevron* deference to the Department of Health and Human Services for a determination of the statutes' requirements. However, the enactment of the Balanced Budget Act provides a direct Congressional statement as to the meaning of the applicable statutes. Section 4714 of the Balanced Budget Act "clarifies that state Medicaid programs may limit Medicare cost-sharing to amounts that, with the Medicare payment, do not exceed what the state's Medicaid program would have paid for such service to a recipient who is not a QMB." H. Conf. Rep. No. 105-217, 143 Cong. Rec. H6252 (daily ed. July 29, 1997). Based upon this clarification, it cannot be disputed that Illinois was correctly administering the cost-sharing program all along.

The Seventh Circuit deferred to the 1997 Congressional clarification in analyzing and construing the cost-sharing statutes. The *Paramount* court ruled that providers of services to QMBs are not entitled to reimbursement at full Medicare rates. The Seventh Circuit's decision was in accord with the decision in *Beverly Community Hospital Association v. Belshe,* 132 F.3d 1259 (9th Cir. 1997). In *Beverly*, the Ninth Circuit recognized that the cost-sharing statutes were ambiguous and that the Congressional clarification in Section 4714 of the Balanced Budget Act tipped the balance in favor of the Secretary's interpretation.

Since the Congressional clarification in section 4714 of the Balanced Budget Act, the circuit courts of appeal have been in accord in construing the cost-sharing statutes. Both the Seventh and Ninth Circuits have

agreed that section 4714 requires deference to the Secretary's interpretation. Of course, the Secretary's construction had always been consistent with the Congressional clarification. In contrast, the pre-Balanced Budget Act decisions in *Rehabilitation Association of Virginia v. Kozlowski*, 42 F.3d 1444 (4th Cir. 1994), *cert. denied*, 116 S. Ct. 60 (1995); *Haynes Ambulance Services, Inc. v. Alabama*, 36 F.3d 1074 (11th Cir. 1994); *Pennsylvania Medical Society v. Snider*, 29 F.3d 886 (3rd Cir. 1994); and *New York City Health and Hospital Corp. v. Perales*, 954 F.2d 972 (2nd Cir. 1992) are distinguishable as those courts did not have the benefit of the Congressional clarification to assist in the determination of the statutes' meanings. Therefore, the requirements of Supreme Court Rule 10(a) have not been satisfied as there is no post-Balanced Budget Act conflict among the circuits which would warrant review of the *Paramount* decision.

III.

THE STATE DEFENDANT DID NOT RETROACTIVELY ELIMINATE PLAINTIFF'S PROTECTED PROPERTY RIGHTS

Plaintiffs incorrectly claim that review is necessary to redress impairment of their property rights. Plaintiffs contend that the State of Illinois was obligated to pay cost-sharing and the State's reliance on the Congressional clarification impermissibly negates plaintiffs' contractual rights to full cost-sharing. Plaintiffs' contention is contrary to the facts of this case. The only contract between plaintiffs and the state defendant clearly states that "[t]he provider shall receive payment

based upon the Department's reimbursement rate which shall constitute payment in full." Moreover, under the provider agreement with the state, Paramount was initially required to seek payment for durable medical equipment from the respective nursing facilities. Nursing facilities expect to pay suppliers like Paramount because the Illinois Medicaid program includes the cost of medical equipment in per diem rates that the IDPA pays to the nursing facilities. These rates are based on a complex methodology to ensure that every facility operates efficiently and economically. 42 U.S.C. §1396a(a)(13)(A). Paramount never attempted to obtain payment from the nursing facilities despite the terms of the agreement. As Paramount, in particular, never attempted to comply with its contracts, the State of Illinois in no way impaired Paramount's contract rights.

At all times, each and every plaintiff knew that the IDPA utilized the state Medicaid rate as payment cap. There was never any expectation that plaintiffs would receive the full Medicare rate. There was no language in the provider contract which promised anything more than the Medicaid rate. Moreover, Congress has expressly reserved "[t]he right to alter, amend or repeal any provision of the [Social Security Act]." 42 U.S.C. §1304. As a result, plaintiffs cannot seriously contend that their contracts with the state have been unconstitutionally impaired through §4714 of the Balanced Budget Act. Plaintiffs' impairment analysis is meritless and cannot be entertained by this court as a basis for granting their petition for writ of certiorari.

CONCLUSION

It is abundantly clear that the Medicaid-financed cost-sharing statutes had caused considerable controversy and argument due to the ambiguity of the statutory texts. The legislation needed clarification. Fortunately, Congress provided this clarification through the Balanced Budget Act of 1997. The circuit courts that have reviewed this recent legislation have been unanimous in the their construction of the clarification and there is no split in the circuits. For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JAMES E. RYAN
Attorney General of Illinois

BARBARA PREINER
Solicitor General of Illinois

JAMES C. O'CONNELL*
MARK LICHTENFELD
Assistant Attorneys General
160 North LaSalle Street
Suite N-1000
Chicago, Illinois 60601
(312) 793-2380

Attorneys for Respondent
Joan Walters

* Counsel of Record